EXHIBITS

A Video Supplement

B Memos Re: Jose Valenzuela from BOP Correctional Officers / Certificates of Achievement (Representative Sampling)

C Declaration of Jose Milton Puentes

D Memorandum of Decision and Order Granting in Part Petitioner's Motion Pursuant to 28 U.S.C. §2255 in Case No. CV-2882-RJK, Filed on December 10, 1998 by United States District Court Judge Robert J. Kelleher

EXHIBIT A

VIDEO SUPPLEMENT

The video may be viewed by
clicking on the following link.

Jose Valenzuela Video Supplement

https://www.dropbox.com/s/7g1siywdty4m41l/Jose%20Valenzuela%20Video%20Supplement%20.mp4?dl=0

If any technical difficulty is encountered, please contact:

Law Offices of Matthew J. Lombard.
mlombard@lombardlaw.net
424-371-5930

EXHIBIT B

MEMOS RE: JOSE VALENZUELA FROM BOP CORRECTIONAL OFFICERS / CERTIFICATES OF ACHIEVEMENT (REPRESENTATIVE SAMPLING)

U. S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
Federal Correctional Institution
Herlong, California 96113

November 16, 2020

MEMORANDUM FOR: TO WHOM IT MAY CONCERN

FROM: K. Williams, Correctional officer.

SUBJECT: Inmate Valenzuela, Jose Reg. No. 19704-148

Mr. Valenzuela is a very respectful and well Behaved Inmate. He shows a lot of respect towards staff members and other inmates. I never had any issues with him. He is a very responsible individual and he's always in good spirit and encourage other to stay positive. Mr. Valenzuela is also a very well educated man and a very hard worker. He's always being productive throughout the day to keep busy. I Believe Mr. Valenzuela is a perfect example of an inmate who has been rehabilitated and could function with society from everything he has learned over his time be inside a prison system.

U. S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
Federal Correctional Institution
Herlong, California 96113

November 16, 2020

MEMORANDUM FOR: TO WHOM IT MAY CONCERN

FROM: T. Munn, Senior Officer Specialist

SUBJECT: Inmate Valenzuela, Jose Reg. No. 19704-148

Mr. Valenzuela has been housed at FCI Herlong since 1/19/2012. Since then he has been extremely positive and well-mannered towards staff and other inmates. He has spent his time educating himself and others with his practice of religion and personal values. He continues to further help and assist staff as needed without complaint or resistance. He has never received an incident report for negative behavior or actions, and encourages other inmates to practice positive living skills. Mr. Valenzuela keeps in close contact with his family and friends and offers positive encouragement, and sends money to them as he can. He is a prime example of a model inmate, and continues to be without any discouragement from other inmates. I believe that if there were more inmates like Mr. Valenzuela, our prison system would become extremely less violent and more compliant, reducing the amount of injuries and stress for staff and inmates.

CODE Program

Certificate of Achievement

This Certifies that

Jose Valenzuela

Register # 19704-148

has successfully completed

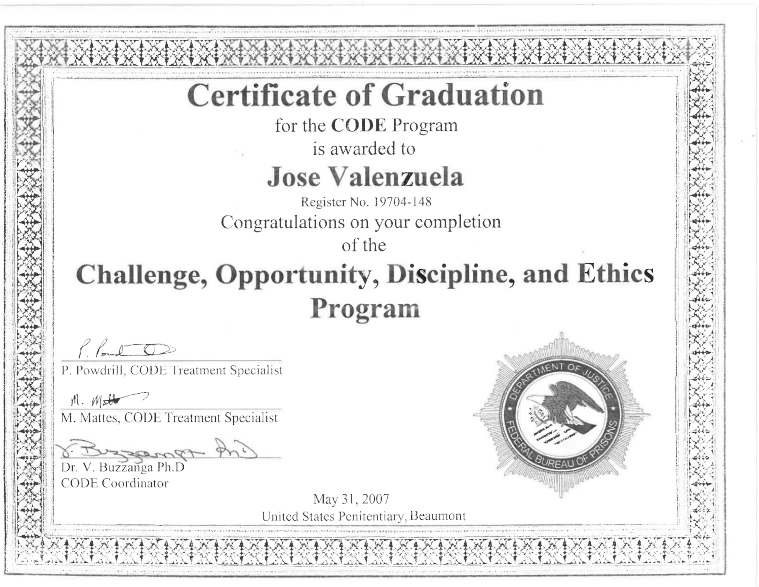
6 of 6 sessions

Commitment to Change-Errors in Thinking

This certificate is hereby issued May 30, 2007

V. Buzzanga Ph.D
CODE Coordinator

P. Powdrill
CODE Treatment Specialist



Certificate of Graduation

for the **CODE** Program
is awarded to

Jose Valenzuela

Register No. 19704-148

Congratulations on your completion
of the

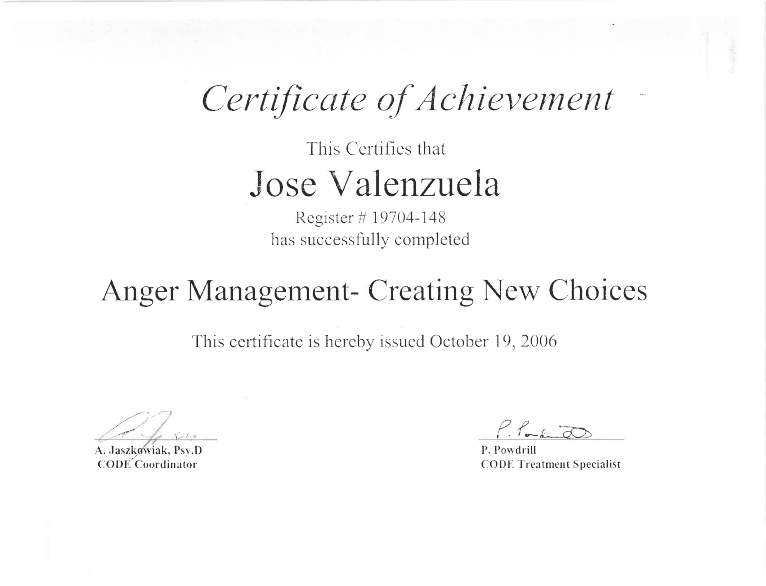
Challenge, Opportunity, Discipline, and Ethics Program

P. Powdrill, CODE Treatment Specialist

M. Mattes, CODE Treatment Specialist

Dr. V. Buzzanga Ph.D
CODE Coordinator

May 31, 2007
United States Penitentiary, Beaumont



Certificate of Achievement

This Certifies that

Jose Valenzuela

Register # 19704-148

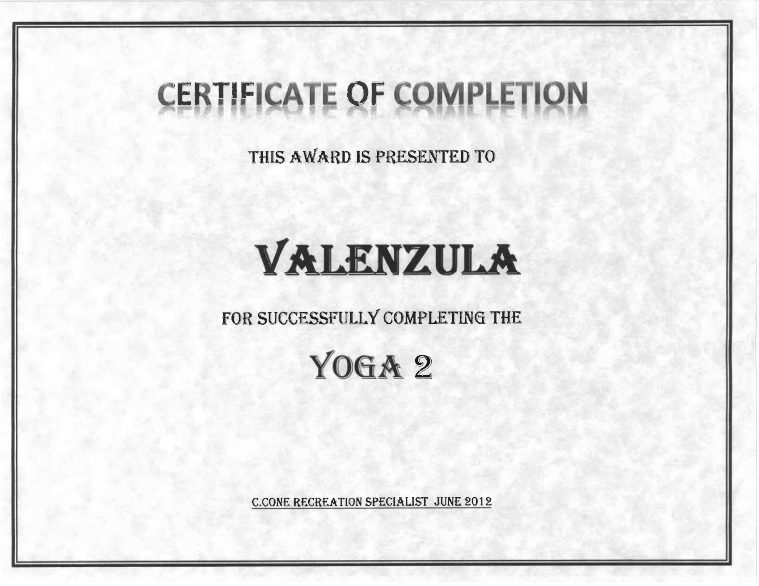
has successfully completed

Anger Management- Creating New Choices

This certificate is hereby issued October 19, 2006

A. Jaszkowiak, Psy.D
CODE Coordinator

P. Powdrill
CODE Treatment Specialist



CERTIFICATE OF COMPLETION

THIS AWARD IS PRESENTED TO

VALENZULA

FOR SUCCESSFULLY COMPLETING THE

YOGA 2

C.CONE RECREATION SPECIALIST JUNE 2012

Certificate of Achievement

This is awarded to

J. Valenzuela

For Completion of the Beginning Spanish Crochet Class

U.S.P. Big Sandy

This Certificate is Hereby Issued This 24 Day of June, 2008

Recreation Specialist

CODE Program
Certificate of Achievement

This Certifies that

Jose Valenzuela

Register # 19704-148

has successfully completed the

Intensive Phase

This certificate is hereby issued April 20, 2007

V. Buzzanga Ph.D
CODE Coordinator

P. Powdrill
CODE Treatment Specialist

THE 7 HABITS of Highly Effective People®

Signature Program

CERTIFICATE of COMPLETION

FranklinCovey is pleased to present

Jose Valenzuela

this certificate for successfully completing

The 7 Habits of Highly Effective People

Signature Program.

Stephen R. Covey, Vice-Chairman

Hyrum W. Smith, Cofounder

Facilitator

FranklinCovey

Certificate of Achievement

This certifies that

Jose Valenzuela

is presented this Certificate of Recognition for

Completion of Thirty Hours in

HEART HEALTHY I

from the

Recreation Department

December 18 , 2006
Date

U.S.P. BEAUMONT
BEAUMONT, TEXAS

E. Jackson, Recreation Specialist

EXHIBIT C

DECLARATION OF JOSE MILTON PUENTES

DECLARATION OF JOSE MILTON PUENTES

I, Jose Milton Puentes, declare and state the following:

1. I am a Federal inmate at FCI Herlong, Reg. No. 69025-112. I was transferred to this facility on May 18, 2018. When I arrived, I was in Sierra Bravo unit (S-B) for one week, then moved to Tahoe Bravo unit (T-B) for several months, and then I was moved to the Sierra Charly unit (S-C) on October 10, 2018, where I met Jose G. Valenzuela (Reg. No. 19704-148).

2. The first thing that impacted me when I met him was the length of time he had been incarcerated (at that time, 41 years), and that his case was non-violent. Also, his lack of any incident reports in recent years, which is rare to find in an inmate.

3. I notice the age deterioration in his face, his cataracts on the left eye, his skinny pale body, his expressions, reminded me of my dad when he passed away in 2012, he was 83 years old. I have known Mr. Jose G. Valenzuela for 2 years. I walk with him almost every day to chow hall and back to the unit. I have conversations with him about his family, and old stories from his past and what I have noticed in him, that he forgets everything. He constantly tells me the same stories like if he never told them to me before. He forgets the days of the week, the time. He is like a "robot," he eats sometimes, he uses the bathroom, and that's it. That's how my father started with his first stages of dementia. I noticed it right away, just like other people in the unit and in the compound. I noticed it personally because I lived it with my dad for years and it was getting worse due to his aging process that was deteriorating more, to the point that he would forget everything and repeat stories constantly, he could not breathe right.

4. Since February 5, 2020, I have lived with Mr. Jose Valenzuela, sharing the same cell, and what I can say of seeing him, just like I would see it in my dad, he frequently forgets things, stories that he tells me on and on, he forgets

to breathe at nights, but his body forces him to breathe through his mouth. He is weak and exhausted, he wakes up constantly, and wakes me up throughout the night. I have patience with him because I understand what he is going through. I see it every day, that he is constantly worried, stressed, anxious, he is physically tired of being here, he is moody most of the time complaining of strong headaches on the left side of his head due to chronic sinus inflammations. I didn't know if he had migraines because of his sinus condition, until I read his medical file, very extensive, and found out he has been suffering since he had that car accident in 1966 and fell off a horse in 1976; an ongoing medical condition that is chronic respiratory due to his sinuses. The medical records are clear and overwhelming, showing abnormalities on the left side of his head since 1994 up to 2019 receiving care, treatment with different medicine that would not work.

5. Jose does not eat well. I have to tell him to eat every day. He says he is not hungry but my dad was too at the beginning.

6. I believe Jose has a sister who is older than him in Mexico with that same mental condition but it is at a further stage. Sometimes at nights I hear him weeping and he does not realize it. He wakes up and tells me he has some type of eye allergies. He complains almost every day about burning sensations inside his abdomen, and does not like to take "Ranitidine," since he saw on the news that it provokes cancer (he tells me that almost every day).

7. I have compassion for the elderly because it reminds me of my dad, and I'm always willing to help out. So I make the foregoing affidavit in good faith and in support of Mr. Valenzuela's compassionate release. If it is needed for me to testify in court regarding this matter, I am willing to appear either in person at a

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hearing or through video teleconference.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 16 day of November, 2020.

JOSE MILTON PUENTES

EXHIBIT D

MEMORANDUM OF DECISION AND ORDER GRANTING IN PART PETITIONER'S MOTION PURSUANT TO 28 U.S.C. §2255 IN CASE NO. CV-2882-RJK, FILED ON DECEMBER 10, 1998 BY UNITED STATES DISTRICT COURT JUDGE ROBERT J. KELLEHER

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CR 77-1047

JOSE GUADALUPE VALENZUELA, Petitioner, v. UNITED STATES OF AMERICA, Defendant	NO. CV 97-2882-RJK MEMORANDUM OF DECISION AND ORDER GRANTING IN PART PETITIONER'S MOTION PURSUANT TO 28 U.S.C. § 2255

I. BACKGROUND

On December 19, 1977, Petitioner Jose Guadalupe Valenzuela ("Petitioner"), was convicted in this Court of nine narcotics violations: (1) conspiracy to distribute a controlled substance (21 U.S.C. § 846); (2) aiding and abetting two unindicted principals in the trafficking of ten ounces of heroin (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2); (3) aiding another unindicted principal in the trafficking of six ounces of heroin (§ 841(a)(1) and § 2); (4) aiding and abetting three additional unindicted principals in the trafficking of 2.2 pounds of heroin

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(§ 841(a)(1) and § 2); (5) aiding and abetting three principals in the trafficking of 4.4 pounds of heroin (§ 841(a)(1) and § 2); (6) aiding and abetting four unindicted principals in the trafficking of 44 pounds of heroin (§ 841(a)(1) and § 2); (7) aiding and abetting two unindicted principals in the trafficking of 44 pounds of heroin (§ 841(a)(1) and § 2); (8) trafficking, along with five co-defendants, of four pounds of heroin (§ 841(a)(1)); and (9) acting as organizer, supervisor, and manager, with a continuing series of violations, obtaining therefrom substantial income and resources as alleged in Counts 1 through 8, in violation of the federal Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. § 848 ("the CCE Count").

Petitioner, appearing pro se, moves, pursuant to 28 U.S.C. § 2255, to have his CCE conviction vacated on five grounds: (1) the jury instructions on the CCE count were inadequate and misleading; (2) the court failed to give an instruction that the jurors must unanimously agree on the five persons who were supervised, organized, or managed; (3) the court erred by failing to instruct the jury that they could not rely on Count One, the conspiracy count, as a predicate offense for the CCE violation; (4) the court's instructions to the jury that the CCE statute only requires the government to prove three essential elements was grossly inadequate and erroneous; and (5) the court erred in failing to give an instruction that the jury must unanimously agree as to which alleged violations constituted the continuing series of related violations required for conviction of the continuing criminal enterprise charge. Each of these grounds is

similar in that it stems from the jury instructions given at the end of the trial with respect to the CCE Count. Petitioner raises the additional claim in his Supplemental Citations and Reasons for Immediate Issuance of § 2255 Motion that the testimony of co-defendants should have been suppressed pursuant to the holding in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998).

II. ANALYSIS

A. Arguments Raised on Direct Appeal

The Ninth Circuit has previously rejected Petitioner's claims that the Court's instructions on the CCE count were deficient. United States v. Valenzuela, 596 F.2d 1361, 1368 (9th Cir. 1979). To the extent Petitioner's instant arguments are the same as those made on direct appeal, Petitioner is not entitled to have them entertained. See United States v. Vargas, 455 F.2d 501, 501 (9th Cir. 1972) ("The same issue was presented on Vargas' direct appeal and was determined adversely to him. He is not entitled to a second review of the same question in this section 2255 proceeding.").

Although the text of the Ninth Circuit's published opinion sheds little light on the particular jury instruction questions presented in that appeal, a review of Petitioner's original appellate brief is more helpful.

In his direct appeal, Petitioner challenged the § 848 instructions with respect to the "in concert" requirement, the "series" requirement, and the allowance of Counts One through

Eight to be used a predicate offense for Count Nine. See Pl.'s Appellate Br. 52-56. To the extent these arguments are repeated in the instant petition, they are barred by Vargas.

B. Arguments Not Raised on Direct Appeal

It is well established that a defendant who fails to raise an issue at trial or on direct appeal may not raise the issue in a collateral attack, absent a showing of cause and prejudice. United States v. Frady, 456 U.S. 152, 162-69 (1982); United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993) ("If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting from the claim of error."). The Supreme Court has stated generally that "cause" exists if "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). To show prejudice, the petitioner must show that "the constitutional errors raised in the petition actually and substantially disadvantaged his defense so that he was denied fundamental fairness." Murray v. Carrier, 477 U.S. 478, 494 (1977).

Petitioner has failed to show cause for and prejudice resulting from his failure to raise his arguments on direct appeal. Accordingly, the Court will not address them.

C. Rutledge Applies Retroactively

Petitioner argues in light of Rutledge v. United States, 517 U.S. 292 (1996), a Supreme Court decision issued subsequent to Petitioner's conviction, Petitioner's CCE conviction must be vacated. In Rutledge the Supreme Court held a criminal defendant may not be sentenced for both a CCE violation and a § 886 conspiracy violation. Petitioner was sentenced for both.

The Government, on the other hand, argues Rutledge cannot be applied retroactively pursuant to the holding in Teague v. Lane, 489 U.S. 288 (1989). Generally, pursuant to Teague, new constitutional rules of criminal procedure are not applicable retroactively in post-conviction collateral proceedings. Id. The Government contends because Rutledge announced a "new rule" of "constitutional criminal procedure," it may not be applied retroactively to the present § 2255 motion.

Whether Rutledge must be applied retroactively appears to be a question of first impression in the Ninth Circuit. The few published decisions considering the retroactivity of the Rutledge rule have split both in outcome and rationale. See United States v. Wesson, 1998 WL 30695 (N.D. Ill. 1998) (Rutledge would not apply retroactively on collateral review); United States v. Beverly, 1997 WL 666514 (N.D. Ill. 1997) (Rutledge may be applied retroactively to defendant because it was not a "new rule;" it was clearly dictated by precedent at the time of defendant's conviction); Yu v. United States, 1998 WL 160964 (S.D.N.Y. 1998) (Rutledge is retroactive because it is substantive, not procedural).

The Government argues that pursuant to Bousley v. United States, 118 S. Ct. 1604, 1610 (1998), the Rutledge decision is properly categorized as a rule of constitutional procedure and that Teague applies to bar the retroactive application of the Rutledge decision. The Government quotes the following passage from Bousley to support its argument:

> The distinction between substance and procedure is an important one in the habeas context. The Teague doctrine is founded on the notion that one of the principal functions of habeas corpus is to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. Consequently, unless a new rule of criminal procedure is of such a nature that without it the likelihood of an accurate conviction is seriously diminished, there is no reason to apply the rule retroactively. By contrast, decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct beyond the power of law-making authority to proscribe, necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal.

Bousley, 118 S. Ct. at 1610 (citations and internal quotes omitted).

Set forth elsewhere in the Bousley decision is a precise guideline for the application of Teague. The Supreme Court concisely states "because Teague by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." Id. at 1610. Accordingly, the relevant inquiry is whether the Supreme Court in Rutledge "decide[d] the meaning of a criminal statute enacted by Congress." Id.

In Rutledge, the Supreme Court addressed the issue of

whether a defendant who had been convicted of both conspiracy and CCE had been punished twice for the same offense. Rutledge, 517 U.S. at 297. The Court began its analysis with the proposition that "Courts may not 'prescrib[e] greater punishment than the legislature intended,'" and found that dual convictions constitute additional punishment pursuant to Ball v. United States, 470 U.S. 856 (1985). Id. The Court then applied the statutory construction presumption that "where two statutory provisions proscribe the 'same offense,' a legislature does not intend to impose two punishments for that offense." Id. citing Whalen v. United States, 445 U.S. 684, 691-692 (1980); Ball, 470 U.S. at 861. The Court then applied the rule set forth in Blockburger v. United States, 284 U.S. 299 (1932) and concluded the defendant had been punished twice for the "same offense" because a conspiracy offense is a lesser included crime of a CCE offense. Rutledge, 517 U.S. at 300. Finally, the Court found no reason to depart from the presumption that Congress intended to authorize only one punishment. Id. at 307. Accordingly, the Court concluded "'one of petitioner's convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense' and must be vacated." Id. quoting Ball, 470 U.S. at 864.

Because the Supreme Court in Rutledge interpreted criminal statutes enacted by Congress, namely the CCE statute, 21 U.S.C. § 848, and the conspiracy statute, 21 U.S.C. § 846, this Court finds Teague does not apply to bar the retroactive application of Rutledge. See Bousley, 118 S. Ct. at 1610.

A change in substantive, non-constitutional law is applied retroactively to a defendant who was convicted under the previous law and then brought a section 2255 motion alleging his actual innocence in view of the intervening change in law. See United States v. McClelland, 941 F.2d 999, 1001 (9th Cir. 1991) citing Davis v. United States, 417 U.S. 222 (1974) (holding a defendant who had been convicted and punished for an act the law did not make criminal was entitled to challenge the conviction). "[F]ull retroactivity [is] a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." United States v. Johnson, 457 U.S. 537 (1982). "A statute does not mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards. . . . [T]he prior interpretation is, and always was invalid." Strauss v. United States, 516 F.2d 980, 983 (7th Cir. 1975).

Here, Petitioner contends that he was convicted based on an erroneous interpretation of a statute made clear by an intervening Supreme Court ruling. Accordingly, Rutledge compels the conclusion that the conspiracy conviction for violation of 21 U.S.C. § 846 is an "'unauthorized punishment for a separate offense' and must be vacated." Rutledge, 470 U.S. at 864. Thus, Petitioner's 15-year sentence on Count One must be vacated.

However, Petitioner's reliance on Rutledge is misplaced insofar as he seeks to challenge his CCE conviction. There are two reasons for this.

The first is that, despite the Rutledge decision, the

conspiracy underlying the conviction on Count One may properly be used as a predicate offense for the CCE Count. See United States v. Miller, 116 F.2d 641, 678 (2nd Cir. 1997) (holding, post-Rutledge, that a lesser included § 846 conspiracy may serve as a predicate offense for a § 848 CCE conviction).

The second reason is that Petitioner was convicted of seven other narcotics offenses that could serve as predicates to his CCE conviction.

Petitioner contends that because six of these convictions were for aiding and abetting and these convictions rely in part on Title 18 instead of Title 21, these convictions cannot be predicates to a CCE conviction. Petitioner's argument has been squarely rejected in this Circuit. Section 848 may be applied to one whose criminal conduct consists solely of aiding and abetting the criminal conduct of others, if that person is otherwise a kingpin in his own right, and if the criminal conduct aided or abetted would itself qualify under that section. United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992). As Petitioner is otherwise a kingpin and the criminal conduct is clearly a proper predicate for a CCE offense, Petitioner's argument is without merit.

D. Singleton Does Not Apply

Petitioner argues that pursuant to United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), the testimony of his co-defendants should have been suppressed. The Court finds that the Singleton decision has been vacated, and therefore, there is

no merit to Petitioner's argument.

III. CONCLUSION

For the reasons set forth above, Petitioner's motion is GRANTED IN PART and the conspiracy conviction is VACATED based on Rutledge v. United States, 517 U.S. 292 (1996). The motion is DENIED in all other respects.

IT IS SO ORDERED.

DATED: DEC - 9 1998

Honorable Robert J. Kelleher